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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

STANLEY KNAPP, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Knapp does not dispute that the question presented in this case regularly recurs in the courts of appeals. See Pet. 18-20. He cannot deny that the Ninth Circuit adheres to an "entirely discretionary" civil general verdict rule (Pet. App. 14a) even though that rule concededly "is contrary to Supreme Court precedent" (see Pet. App. 75a n.7). Nor does he attempt to reconcile the Ninth Circuit's rule with this Court's reasoning in *Griffin* v. *United States*, 502 U.S. 46, 58-59 (1991). And he does not claim that the Ninth Circuit's rule accords with this Court's recent and unambiguous holding that a "jury's general verdict * * * *cannot be permitted to stand*" if it is "based on instructions that erroneously permitted liability" (*City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991)) (emphasis added). Indeed, Knapp does not mention *Omni* at all.

Instead, Knapp urges this Court to deny review by touting "Judge Wallace's opinion in this case" (Br. in Opp. 12). We agree that that opinion is correct in some respects. Thus, Judge Wallace's opinion brushed aside (Pet. App. 13a) — as had the district court (Pet. App. 40a-41a) — Knapp's specious argument that Ernst & Young "invited the error" and thus rendered "unreviewable" the question presented in that appeal. To the contrary, as Judge Wallace explained (*id.* at 13a), "it would have been pointless for Ernst & [Young] to object to the aiding and abetting instruction" because Ninth Circuit law on the issue was "settled." Moreover, the question was reviewable in any event because "the district court" reviewed "the issue prior to entry of final judgment"; appellate review, therefore, "was not foreclosed." *Ibid.*

Judge Wallace's opinion also acknowledged (Pet. App. 15a) that the decision below squarely conflicts with *Anixter* v. *Home-Stake Production*, 77 F.3d 1215, 1229 (10th Cir. 1996), and we agree. Judge Wallace considered (Pet. App. 15a) the "vigorous * * * criticism" of the Ninth's Circuit's rule to be "persuasive," and we agree. Judge Wallace

followed that persuasively criticized rule only because it "is the law in our circuit" (*ibid.*), and we agree that only the compulsion of circuit precedent could justify that course. If Knapp sincerely appreciated "Judge Wallace's opinion," he would be constrained to acquiesce in a grant of certiorari and permit Judge Wallace to be relieved of the necessity of adhering to a rule that is both ill-conceived and contrary to the holdings of this Court.

But Knapp does no such thing. Instead, he presents several implausible arguments to deflect this Court's scrutiny. As we show below, Knapp's diversionary tactics lack substance, and review by this Court is warranted.

1. To begin with, Knapp suggests (Br. in Opp. 8) that the Ninth Circuit was wrong to concede, in declining to follow *Omni*'s bright-line rule, that its "entirely discretionary" circuit practice of affirming legally undermined general verdicts is "contrary to Supreme Court precedent." *Hendry* v. *Exide Electronics Corp.*, 974 F.2d 1342 (table) (9th Cir. 1992) (reprinted in Pet. App. 70a, 75a & n.7). Knapp's own submission gives the lie to that contention.

Knapp notes (Br. in Opp. 1) that the courts below "found that the jury did not rely on the 'erroneous' aiding-and-abetting theory" based on a "review[] of the record" and an assessment that it was "unlikely" that the verdict rested on that facially invalid theory. But this Court has repeatedly rejected such judicial speculation. To the contrary, in this Court's view, "there is *no way to know* that the invalid claim * * * was not the sole basis for the verdict." *United New York & New Jersey Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959) (emphasis added). As a consequence, a "jury's general verdict * * * *cannot be permitted to stand*" if it is "based on instructions that erroneously permitted liability." *Omni*, 499 U.S. at 384 (emphasis added). In stark contrast with the Ninth Circuit's inquiry whether "another theory * * * was supported by substantial evidence and was submitted to the jury free from error" (Pet. App. 15a), this

Court found it "unnecessary * * * to explore the legality of the other theories" precisely because a court *cannot* "perceiv[e] upon which plea [the jury] found." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 30 (1962).

2. Knapp confuses the issues in an attempt to submerge the conflict (see Pet. 9-13) between the rule applied below and the holdings of this Court. He begins by approaching the question with Olympian generality, as if we questioned whether any instructional error ever could be found harmless to the count or theory it addressed. See Br. in Opp. 7-9 & nn.2-3. But the civil general verdict rule does not come into play unless the reviewing court first determines that a legal error is *not* harmless to the theory it affects. Only then must the court decide whether a general verdict may be upheld on another theory.

Harmlessness of the type that Knapp discusses could not be claimed here: the entire aiding-and-abetting theory was legally invalid. Knapp suggests, however, that this Court's precedents permit reviewing courts to apply an *additional*, entirely discretionary harmless-error inquiry when a legally invalid theory is but one of two or more theories supporting a general verdict. But *Omni* and this Court's other precedents express this Court's consistent contrary judgment: as a matter of law, the submission of a *legally* invalid theory is *not* rendered harmless by the submission of an alternative, legally sound, and factually supported theory. Rather, in such cases, the judgment must be reversed and the case retried. *E.g.*, *Sunkist*, 370 U.S. at 29-30.

Knapp professes (Br. in Opp. 9) to glimpse a fact-intensive, discretionary harmless-error review in *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993). In *Spectrum*, the Ninth Circuit had affirmed a general jury verdict on a legally erroneous ground without addressing whether any alternative theories might have supported the verdict. See *id.* at 452. It was the appellate affirmance, not the jury verdict,

that "rested solely" on the ground that this Court held "legally erroneous." *Id.* at 459. This Court did not need to examine the alternative theories because it followed *Sunkist* and *reversed* the judgment. Knapp is not helped by this Court's statement that a new trial was necessary because "the jury's *verdict* did not *negate* the possibility that the * * * verdict rested on the [invalid] ground alone." *Id.* at 459 (emphasis added).[1] Knapp frankly admits (Br. in Opp. 9) that the courts below *could not* and *did not* rely on the jury's verdict alone, but rather relied on their assessment of "the trial record." See Pet. App. 44a (no entitlement to new trial "viewing the record as a whole").

Contrary to Knapp's contention (Br. in Opp. 9), the courts below did *not* hold that their clairvoyant assessment of the invalid theory's effect on the jury deliberations "negate[d] the possibility" that the jury relied on the aiding-and-abetting theory. Rather, as Knapp elsewhere admits (Br. in Opp. 1), the district court simply found it "unlikely" that the verdict had rested on that theory (Pet. App. 43a), and the Ninth Circuit deferred to that conclusion (Pet. App. 16a-17a). Tellingly, Knapp does *not* contend that he could prevail under the rule actually applied in *Spectrum Sports* and *Omni*.

3. Knapp also denies (Br. in Opp. 7-15) that the courts of appeals are in conflict. But he does not contest our showing (Pet. 13-14) that the strict civil general verdict rule applied in the Eleventh and District of Columbia Circuits conflicts with the discretionary practice in the Ninth Circuit, and he simply misstates the rules followed in other courts of appeals.

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[1] That statement merely recognized that by its generality the verdict could not "negate" that "possibility." This Court had explained in *Griffin* and *Sunkist* that a verdict's "generality" effectively "prevents" a court "from perceiving upon which plea" the jury "found." *Sunkist*, 370 U.S. at 30.

First, the opinion below itself identified the unmistakable conflict with *Anixter*, where the Tenth Circuit reversed on similar facts because it could not say with "'absolute certainty' that the jury was not influenced" by the submission of the legally invalid aiding-and-abetting theory. Pet. App. 15a (quoting *Anixter*, 77 F.3d at 1229). The court below considered the rule in *Anixter* "persuasive criticism" of the Ninth Circuit rule. *Ibid.*

Second, Knapp erroneously suggests (Br. in Opp. 13) that factual differences, rather than conflicting rules of law, account for the differing result in *Anixter*. In *Anixter*, "[t]he bulk of the evidence and the argument on [the auditor's] liability involved his certification of balance sheets included in prospectuses"; the "thrust of the evidence went to his acts as a primary violator," but "some evidence and arguments in the record could be interpreted as going to aiding and abetting liability rather than to actual statements or omissions." 77 F.3d at 1230. Similarly, "[t]he focus of th[is] case," in Knapp's words (Br. in Opp. 4-5), "was the financial statements in the prospectus." But the district court observed that "the issue of secondary liability certainly is central to th[is] case." Pet. App. 41a. And the Ninth Circuit confirmed (Pet. App. 16a-17a) that "each expert spent some time * * * providing evidence that supported secondary liability" and that Knapp's closing argument specifically identified Ernst & Young's "association with the financial statements" — a basis only for aiding-and-abetting liability — "as a separate issue."[2] If anything, secondary liability was *more* "central to th[is] case" (Pet. App. 41a) than it was to *Anixter*. Knapp also misrepresents (Br. in Opp. 13) that the "general verdict" in *Anixter* "included § 11 claims"; in fact, the jury interroga-

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[2] Knapp told the jury that, in part, the case was "about the fact that ATV was reporting unaudited financial statements, financial statements that the accountants had not examined, and they didn't have the internal controls" — all supporting aiding-and-abetting, not direct, liability. Tr. 4782-4783.

tories in *Anixter* separated Rule 10b–5 claims from Section 11 claims. See 77 F.3d at 1228 n.14.

Third, Knapp tries to mislead this Court by citing (Br. in Opp. 14 n.10) several Tenth Circuit cases that are not good law. The Tenth Circuit expressly disavowed its former ad hoc exceptions to this Court's general rule in *Farrell* v. *Klein Tools, Inc.*, 866 F.2d 1294, 1300 (10th Cir. 1989). In *Farrell*, after canvassing the deep divisions among the circuits, the Tenth Circuit "strictly imposed the general rule" (*ibid.*), rejected the suggestion that "the harmless error principle applies" (*id.* at 1298), and repudiated *by name* the very cases that Knapp misrepresents to this Court as the law of the Tenth Circuit. *Id.* at 1298-1300 (reversing defense verdict although defective defense not mentioned in opening statement or closing argument).

Finally, Knapp attempts to conceal the conflict among the circuits by smothering this Court with citations to cases that involve factual insufficiency rather than legal error (see *Griffin*, 502 U.S. at 58-59) or that reference but do not apply a rule of discretionary affirmance.[3] Since this Court reaffirmed the general rule of reversal in *Omni*, the courts of appeals — *other than* the Ninth, Seventh, and possibly the Second Circuits — have applied (or recognized) only principled and circumscribed exceptions to the rule. Each of *those* narrow exceptions relied on a *verdict* that on its face *negated* — not merely made less likely — the possibility that the jury relied on the invalid ground in finding liability, and thus took the case outside the rule: jury interrogatories that separated

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[3] The only cases cited in the Brief in Opposition that actually affirm a general verdict resting on a *legally* erroneous alternative ground are *Brochu*, *Collum*, and *Lusby* v. *T.G. & Y. Stores*, 796 F.2d 1307, 1310-1311 (10th Cir.), cert. denied, 479 U.S. 884 (1986). We discussed the first two in the petition (at 14-15, 23). *Lusby* relied on waiver principles, and its dictum on review of general verdicts is not good law in the Tenth Circuit. See *Anixter*, 77 F.3d at 1229; *Farrell*, 866 F.2d at 1298-1300.

the flawed issues from the sound; elements of the invalid theory that included all the elements of the sound theory; and a jury charge that predicated some category of damages actually awarded on a finding of liability on the sound theory. *E.g.*, *Reeves* v. *Acro Medical Corp.*, 44 F.3d 300, 303 (5th Cir.), cert. denied, 115 S. Ct. 2251 (1995); *Tioga Public School District #15* v. *United States Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993); *Harwood* v. *Partredereit AF*, 944 F.2d 1187, 1192-1193 (4th Cir. 1991), cert. denied, 503 U.S. 907 (1992). See also Pet. 15 (discussing First Circuit approach).

There is far more than a "semantic difference" (Br. in Opp. 11) between these principled exceptions that rely on the structure, logic and integrity of the jury verdict itself and the Ninth Circuit's "entirely discretionary" attempt (Pet. App. 14a), contrary to this Court's holdings, to "perceiv[e] upon which plea [the jury] found" (*Sunkist*, 370 U.S. at 30) by scouring the entire trial record. The conflict is deep and significant, and warrants review.

4. In an effort to shore up an insupportable rule, Knapp clings to the identities of the authors of the opinion below and of *Traver* v. *Meshriy*, 627 F.2d 934 (9th Cir. 1980). As we explained above, "Judge Wallace's opinion" gives Knapp cold comfort. Then-Judge Kennedy's authorship of *Traver* provides Knapp no more help for two reasons. First, *Traver* involved only a question of evidentiary insufficiency. In context, the phrase "error of law in submitting the theory to the jury" (627 F.2d at 938) refers to a "legal error" arising from the "inadequacy of evidence" to justify an instruction on a legally valid theory (*Griffin*, 509 U.S. at 59). The *holding* of *Traver*, unlike the decision below, was consistent with *Griffin* and with decisions that have applied *Griffin* to civil cases.[4] Second, *Traver* preceded Justice Kennedy's participa-

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[4] *E.g.*, *Composite Marine Propellers, Inc.* v. *Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir. 1992); *Walther* v. *Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir.), op. denying reh'g, 977 F.2d 161, 162 (5th Cir. 1992).

tion in this Court's unqualified reaffirmance of the rule of *Sunkist* in *Omni* and *Spectrum Sports*.

5. Ernst & Young urged the district court to present the jury with interrogatories so that a reviewing court would *not* be left with "no idea what the jury found to have been wrong." Tr. 4710. Knapp successfully opposed any effort to relieve the inscrutability of a general verdict. Tr. 4712.

But when this Court's holding in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439 (1994), undermined the general verdict, Knapp invoked Federal Rule of Civil Procedure 51 and claimed that Ernst & Young had waived its right to the benefit of that case because it objected to the contents of the aiding-and-abetting instruction at trial but not to the provision of any instruction on that theory.[5] Both of the courts below flatly rejected that contention. The district court at the outset was "not convinced" that Ernst & Young waived the objection because the issue for post-trial consideration was not some detail of wording, but rather "an instruction erroneously" adding an "entire basis for liability." Pet. App. 40a. In any event, given the settled acceptance of aiding-and-abetting liability at the time of trial, the district court held that "requiring an objection under these circumstances" would "encourag[e] numerous and/or pointless objections" on "then settled principles out of hope that those principles will be later overturned." *Id.* at 40a, 41a.

The Ninth Circuit agreed that "it would have been pointless for Ernst & [Young] to object to the aiding and abetting instruction" because Ninth Circuit "law was settled" on the point. Pet. App. 13a. Moreover, because the district court "fully considered the question" and decided "the issue prior

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[5] Ernst & Young specifically objected that Section 10(b) did not authorize a cause of action for aiding and abetting the violation of another based on recklessness rather than fraudulent intent. ER 440:105.

to entry of final judgment," appellate "review was not foreclosed." *Ibid.*

Knapp trots out the same waiver argument in this Court, and it again deserves short shrift. This Court, like the Ninth Circuit, does not require as a condition for further review "that a party demand overruling of a squarely applicable, recent circuit precedent." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). In addition, like the petitioner in *Williams* (504 U.S. at 44), Ernst & Young *did* object to the challenged theory to the extent consistent with binding precedent. Finally, waiver claims are beside the point where, as here, "the Court of Appeals, like the District Court before it, decided the substantive issue presented" (*Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991)). See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

But more fundamentally, the issue presented in *this* petition "focus[es] * * * not on the jury instruction itself, but on the denial" of Ernst & Young's motion for a new trial. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion of O'Connor, J.). The question is not whether the jury should have been instructed that it could hold Ernst & Young liable for aiding and abetting a violation of Section 10(b). *Central Bank* settled that issue. The question presented by the petition involves the review of a general jury verdict based on a legally valid ground and a legally invalid ground. *That* question by definition can arise only *after* a verdict; Ernst & Young presented, and the district court ruled upon, that question before final judgment was entered. Likewise, Ernst & Young argued the same question in the court of appeals, which ruled on it as well.

This case thus bears little resemblance to *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987) (per curiam). The Court in *Kibbe* sought to resolve a "fairly included" question that addressed the substance of a jury instruction, but that the petitioner had not raised in the district court, in the court of appeals, or in the petition for a writ of certiorari. *Id.* at 259-

260. Neither of the lower courts, therefore, had passed upon the "fairly included" issue, whereas the issue presented in our petition received the full attention of both courts below.

In sum, Knapp's reliance on Rule 51 is a desperate attempt to avoid review of an indefensible $1.6 million judgment. "Because the District Court reached and fully adjudicated the merits" of the question presented here, "and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if [this Court] refused now to reach the merits [itself]." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). This Court's intervention is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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